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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**FACEBOOK, INC.'S STATEMENT IN
SUPPORT OF ADMINISTRATIVE
MOTION TO FILE UNDER SEAL
APPELLATE RECORD OF APPEAL OF
SPECIAL MASTER'S AMENDED ORDER
RE: PRODUCTION OF ADI RELATED
DOCUMENTS**

Pursuant to Civil Local Rules 7-11 and 79-5, Facebook, Inc. (“Facebook”) hereby submits this Statement In Support of its Administrative Motion To File Under Seal Appellate Record Of Appeal Of Special Master’s Amended Order Re: Production Of ADI Related Documents. Dkt. 777. Facebook’s proposed redactions are limited to (i) confidential information the Court has sealed previously, (ii) confidential details of Facebook’s App Developer Investigation (“ADI” or “the Investigation”), and (iii) highly confidential investigative reports from ADI that were prepared at the direction of counsel and produced under compulsion. Public disclosure of Facebook’s investigative reports would publicly reveal privileged and highly confidential information from Facebook’s legal investigation; reveal highly sensitive information regarding non-parties; allow Facebook’s competitors to copy ADI’s proprietary methods; potentially compromise Facebook’s security enforcement; and expose competitively sensitive information regarding Facebook’s technical infrastructure and operations. There is good cause to permanently seal this information, which the Special Master has indicated is not necessary to his ruling.

I. Background

Additional background regarding proceedings before the Special Master is included in Facebook’s Statement In Support Of Sealing Special Master’s Orders Regarding Production Of ADI Related Documents. Dkt. 788. On December 23, 2021, Facebook appealed the Special Master’s Amended Order Regarding Production Of ADI Related Documents, Dkt. 780, and filed an Administrative Motion To File Under Seal the Appellate Record of its appeal, Dkt. 779. The Appellate Record contains the underlying materials before the Special Master related to this dispute, including the Special Master’s orders and attached exhibits sought to be sealed in Facebook’s Statement In Support of Sealing Special Master’s Orders Regarding Production Of ADI Related Documents, Dkt. 788, as well as the parties’ JAMS submissions.

II. The Good Cause Standard Applies Because The Motion Is Unrelated To The Merits

Courts seal information in non-dispositive motions if there is good cause to do so because public disclosure of the information would cause harm or prejudice, and the request is narrowly tailored. *Doe v. Walmart, Inc.*, 2019 WL 636362 at * 1–3 (N.D. Cal. Feb. 11, 2019); *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). The Order and Amended Order

1 relate to a discovery dispute, not the merits of this action, so the good cause standard applies.

2 **III. There Is Good Cause To Seal Facebook's Limited Proposed Redactions**

3 Facebook asks the Court to permanently seal (i) limited information the Court has sealed
4 previously; (ii) confidential information regarding the number of apps investigated and reports,
5 audits, and interviews from ADI, and (iii) privileged background and technical reports prepared by
6 Facebook's consulting experts at the direction of counsel, which Facebook has produced to Plaintiffs
7 under compulsion over its assertions of attorney-client privilege and work product protection.

8 ***Information the Court has sealed previously.*** Facebook asks the Court to seal limited
9 portions of documents containing information that it has previously sealed, including:

10 1. The identities of consulting experts retained by Gibson Dunn to provide professional
11 services related to ADI. This information is confidential and commercially sensitive, Southwell
12 Decl. ¶ 11, and the Court has previously found good cause to seal it. Dkts. 737, 764.

13 2. The identities of apps and developers investigated during ADI and actions taken
14 against them, which the Court has previously sealed. *See* Record at 0142–44, 0907–09 (copy of Dkt.
15 513-1, sealed by the Court at Dkt. 519). This information is not only confidential to Facebook but
16 also to third parties who would likely consider their app IDs, suspension status, and any rationale for
17 that suspension sensitive. Southwell Decl. ¶ 12. As explained previously, disclosure that particular
18 apps were suspended may also unfairly inflict reputational harms on parties that Facebook suspended
19 because they did not cooperate with ADI, as opposed to a specific finding of wrongdoing on
20 Facebook's platform. Dkt. 514 at 1–2; Dkt. 514-1 ¶¶ 4–5; Southwell Decl. ¶ 12.

21 3. Limited redactions to prior briefs to the Court, which include (i) the identities of
22 Facebook's consulting experts, (ii) privilege log entries describing confidential materials, and (iii)
23 detailed descriptions of the documents reviewed *in camera*. Record at 0244–45, 0329–38, 0929–30.
24 These redactions are identical to redactions the Court has approved previously. Dkts. 743-5, 743-3.

25 4. The name and purpose of an email account created and used for ADI, *e.g.*, Record at
26 0404:24, which the Court found good cause to seal previously, *see* Dkt. 743-4 at 16:3–19; Dkt. 744.

27 Because of the harm that would occur from public disclosure of this confidential information,
28 Southwell Decl. ¶¶ 10–12, Facebook respectfully asks the Court to again seal this information.

Number of apps investigated and reports, audits, and interviews. There is good cause to seal the numbers of apps investigated, reports and documents generated, and audits and interviews conducted by the Investigation. *E.g.*, Record at 0018:13–14. There was no industry standard for investigating millions of applications; the ADI team devised and tailored proprietary methods and techniques for conducting the investigation. Southwell Decl. ¶ 8. Public disclosure of these figures would reveal ADI’s strategies—developed at Facebook’s expense—for ranking the risks of developers, determining how many warranted increased scrutiny, and the depth of investigation into each. *Id.* ¶ 13. Facebook’s competitors could use this information to improve their own investigations into data misuse, to Facebook’s competitive disadvantage. *Id.*; see *In re Liboderm Antitrust Litig.*, 2016 WL 4191612, at * 26 (N.D. Cal. Aug. 9, 2015) (sealing descriptions that “reflect[ed] and convey[ed] confidential, proprietary information”). Bad actors could also use this information to evade investigative and enforcement mechanisms Facebook has enacted to detect and disrupt abuse of its platform, potentially harming both Facebook and its users. Southwell Decl. ¶ 13.

Privileged investigative reports generated by Facebook’s consulting experts. There is good cause to seal entirely privileged investigative reports that were prepared by Facebook’s consulting experts at the direction of counsel and to assist counsel in providing Facebook with legal advice. Record at 0424–0797. These reports were designed to capture information that counsel deemed relevant to assessing Facebook’s legal risks, Southwell Decl. ¶¶ 17, 20, 22, and Facebook produced them to Plaintiffs only under compulsion. These reports are not only privileged; they are also replete with confidential information about Facebook, ADI, and the third parties that Facebook investigated. *Id.* ¶ 21. If disclosed, these reports would harm Facebook and third parties for four reasons.

First, each report is focused on a specific developer and/or set of apps investigated by ADI and includes substantial sensitive business information about third parties. *Fed. Trade Comm’n v. Qualcomm Inc.*, 2018 WL 6615298, at *3 (N.D. Cal. Dec. 17, 2018) (granting motion to seal “competitively sensitive business information” of non-parties). The background and technical reports were intended to identify potential concerns about third-parties for counsel to investigate, and in many cases, concerns identified were not confirmed or were later disproven based on additional evidence gathered by the ADI team. Disclosure of any portion of these reports would reveal

1 confidential and highly sensitive information about third parties and—in some cases—cause public
2 disclosure of unverified (and in some cases disproven) information about these parties. Southwell
3 Decl. ¶ 21. The reports should be sealed to protect the rights of non-parties and for the same reasons
4 the Court has sealed the identities of the apps and developers that Facebook investigated during ADI.
5 Indeed, disclosure of any portion of the reports would disclose publicly which apps were investigated
6 (and substantial information about those apps), undermining the Court’s prior ruling.

7 Second, if publicly disclosed, the information in Facebook’s privileged background and
8 technical reports could pose security risks to Facebook and its users by revealing ADI’s methods, the
9 information Facebook considered worthy of investigation, and the capabilities of Facebook’s
10 investigative team. ADI was designed to identify applications that may have misused data before
11 additional platform protections were implemented, and these reports were designed to capture the
12 information counsel deemed significant in investigating potential data misuse. Southwell Decl. ¶¶ 4,
13 5. Every portion of the reports reveals what information Facebook’s attorneys deemed relevant to
14 assessing the potential for data misuse. *Id.* ¶ 22. They also reveal confidential information about
15 Facebook’s privacy and security architecture. Publicly revealing what information Facebook’s
16 counsel considers significant in investigating apps, the tools and capabilities Facebook may use to
17 uncover information about data misuse, and information regarding Facebook’s privacy and security
18 architecture could all provide bad actors with a roadmap to evade investigative and enforcement
19 mechanisms Facebook has enacted to detect and disrupt abuse of its platform. *Id.*

20 Third, disclosure of the reports would publicly reveal commercially sensitive information
21 regarding Facebook’s technical infrastructure and operations. In investigating the potential for data
22 misuse, reports include details about where certain Facebook data is stored and how it could be
23 accessed, consistent with users’ privacy selections. Southwell Decl. ¶ 23. Developing methods for
24 protecting user privacy and storing user data are important needs for any social media platform, and if
25 publicly disclosed, Facebook’s competitors could use information revealing Facebook’s proprietary
26 methods for tracking, analyzing, and storing user information to improve their own methods of
27 storing user data to Facebook’s competitive disadvantage. *Id.* For this reason, the Court recently
28 sealed information regarding how Facebook stores and processes user data, and it should do so here,

1 too. *See* Dkt. 767 at 4 (sealing request); Dkt. 770 (order sealing such information).

2 Fourth, disclosure of any portion of the privileged, investigative reports would reveal
3 confidential information about the Investigation’s innovative and proprietary design, structure,
4 techniques, and strategies. As previously stated, there was no industry standard for investigating
5 millions of applications and the ADI team devised and tailored proprietary methods and techniques.
6 Southwell Decl. ¶ 8. The reports are the result of proprietary analytics designed exclusively for ADI
7 to score, rank, and better understand available data about each app and developer. *Id.* ¶ 18. The
8 topics of investigation in each report—even including analyses of publicly-available information—
9 reveal the criteria and information that were important to the ADI team’s innovative and proprietary
10 analyses. *Id.* ¶ 19. Publicly disclosing this information would allow Facebook’s competitors to copy
11 ADI’s methods and techniques and use Facebook’s investment and experience to gain an unfair
12 competitive advantage. *Id.* ¶ 24; *see, e.g., In re Liboderm Antitrust Litig.*, 2016 WL 4191612, at * 26
13 (Aug. 9, 2015 N.D. Cal.) (sealing privilege log descriptions that “reflect[ed] and convey[ed]
14 confidential, proprietary information about Endo’s business operations as well as its strategies”).

15 **IV. The Limited Proposed Redactions Are Narrowly Tailored**

16 As stated, Facebook’s privileged and highly confidential background and technical reports
17 should be sealed in their entirety. These reports cannot be more narrowly redacted without revealing
18 confidential information, and sealing this information would not affect the public’s ability to
19 understand the Special Master’s rulings. Indeed, the Special Master’s second Amended Order,
20 Record at 0001–0005, does not even attach the reports, which we understand reflects the Special
21 Master’s judgment that this confidential information is not significant to his ruling. For the
22 remaining materials, Facebook’s proposed redactions are confined to information the Court has
23 previously found good cause to seal or only that information necessary to prevent competitive harm
24 to Facebook. *See Dunbar v. Google, Inc.*, 2013 WL 12216625, at *1 (N.D. Cal. Aug. 18, 2014)
25 (granting sealing requests that were “narrowly tailored to protect . . . proprietary information”).

26 * * *

27 For these reasons, Facebook respectfully requests that the Court permanently seal the
28 confidential information contained within its limited proposed redactions to the Appellate Record.

1 Dated: January 11, 2021

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